SUPREME COURT, U. S.

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Nos. 71-1307 and 71-6519

In the Supreme Court of the United States

OCTOBER TERM, 1971

EDWARD SAMUELS, PETITIONER

v.

UNITED STATES OF AMERICA

MAX BLAUNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (NO. 71-6519) AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B)[1] is reported at 453 F.2d 805. The opinion of the

[1] "Pet." refers to the petition of petitioner Samuels.

district court (Cannella, D.J.) on the *ex post facto* issue (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1971. Petitioner Blauner's petition for rehearing was denied on March 3, 1971 (Pet.-B, App. A).[2] Petitioner Samuels' petition for rehearing was denied on March 10, 1972 (Pet. App. B, 39). The petition for a writ of certiorari in No. 71-1307 was filed on April 10, 1972. By order of March 7, 1972, Mr. Justice Marshall extended the time for filing a petition for certiorari in No. 71-6519 to April 17, 1972. The petition for certiorari in No. 71-6519 was filed on April 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the convictions of petitioners of conspiracy to evade tax and to defraud the United States in violation of 18 U.S.C. 371 are valid under the *ex post facto* clause of the Constitution.

2. Whether petitioner's Sixth Amendment right to a speedy trial was violated.

3. Whether petitioner Blauner's rights to counsel and due process were violated by use of his grand jury testimony at trial.

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[2] "Pet.-B" refers to the petition of petitioner Blauner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions are set forth at Pet. 3.

The pertinent provisions of 18 U.S.C. 2 and 371 and of 26 U.S.C. 7201 and 7206 are printed in the Appendix, *infra*, p. 16.

STATEMENT

After a jury trial with a third defendant,[3] petitioners were convicted of one count of conspiracy to evade taxes and to defraud the United States, in violation of 18 U.S.C. 371, of three counts of attempted evasion of interest equalization tax, in violation of 26 U.S.C. 7201,[4] and of four counts of assisting in the preparation or presentation of false interest equalization tax returns, in violation of 26 U.S.C. 7206(2). They were sentenced to eighteen months' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A, 29-38) and denied rehearing (Pet. App. A, 39; Pet.-B App. B).

A full statement of the facts of these cases necessitates a brief review of the history and purpose of the Interest Equalization Tax Act, P.L. 88-563, 78

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[3] The conviction of co-defendant William Binder was also affirmed on appeal, 453 F. 2d 805, and he has filed a separate petition for a writ of certiorari (No. 71-1290).

[4] The interest equalization tax liability was not that of petitioners, but they were charged as principals under 18 U.S.C. 2.

Stat. 809.[5] This Act (with exceptions not here relevant) imposes an excise tax on the purchase of foreign securities by a citizen or resident of the United States from a person not a citizen or resident (26 U.S.C. 4911, 4918, 4920). President Kennedy had proposed this tax to help correct the deficit in the United States balance of payments by inhibiting the flow of dollars out of the country for the purchase of foreign securities. S. Rep. No. 1267, 88th Cong., 2d Sess. (1964-2 Cum. Bull. 767).[6] To prevent a run of last-minute investments in anticipation of passage of the proposal, the President's original message to the Congress asked that the tax be made retroactive. 109 Cong. Rec. 12806 (Senate), 12940 (House of Representatives) (1963). The Act was enacted on September 2, 1964, and the tax thereby imposed applied retroactively to purchases made after July 18, 1963 (Section 2(c) of the Act).

During legislative consideration of the President's proposal, there developed, in response to the proposal and the increasing likelihood of its passage, a disparity between the market prices of American-owned and foreign-owned foreign securities. The former commanded a slight premium over the latter in Amer-

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[5] 26 U.S.C. 4911, *et seq.*

[6] The background of the Act is set forth in greater detail in the opinion of the United States Court of Claims in *First National Bank in Dallas* v. *United States*, 420 F. 2d 725, certiorari denied, 398 U.S. 950. See also H. Rep. No. 1046, 88th Cong., 1st Sess. (1964-2 Cum. Bull. 708); H. Conf. Rep. No. 1816, 88th Cong., 2d Sess. (1964-2 Cum. Bull. 815).

ican markets, because investors realized that acquisitions of the latter might give rise to a retroactive tax. As a result of this premium, an American dealer could obtain arbitrage profit by buying foreign-owned securities and reselling them as American-owned.[7] See Pet. App. A, 31-32.

During this time, in March 1964, petitioner Samuels, a customer's man at the New York brokerage firm of Coggeshall & Hicks, commenced active trading in an arbitrage account in the name of Weston Trading Corporation (R. 401-402; Govt. Ex. 66A-B-C, R. 232).[8] Weston was a shell corporation[9] without assets and was controlled by petitioners' co-defendant, Henry Scharf (R. 68, 272, 296-297).[10] Scharf placed the purchase and sale orders with petitioner Samuels from his office in Westport, Connecticut (R. 70, 92-95, 269-270), where he had a direct telephone line to Coggeshall & Hicks in New York (R. 71). From March through July 1964, Weston

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[7] The arbitrage profits obtainable on such transactions were generally small in relation to the interest equalization tax liability which would accrue thereon if, as proved to be the case, the tax were imposed retroactively. Thus legitimate dealers engaging in such transactions were in effect betting against a retroactive imposition of the tax.

[8] "R." refers to the appendix below.

[9] The use of shell corporations for arbitrage trading presumably was designed to avoid the risk of loss by limiting recovery of any retroactive tax to the amount of any accumulated arbitrage profits. Compare note 7, *supra*.

[10] Scharf disappeared following the filing of the indictment and has not been found or brought to trial.

Trading Corporation purchased and resold approximately $10,000,000 worth of foreign securities, most of them Canadian, as American-owned foreign stock (Govt. Ex. 66-A-B-C, R. 232; Govt. Ex. 112, R. 253). The profit was approximately $30,000, after the payment of transfer taxes and more than $177,000 in brokerage commissions (Govt. Exs. 72-82, R. 232; Govt. Ex. 115, R. 291). Petitioner Samuels received either 40 percent or 50 percent of the gross commissions, depending on the kind of stock (R. 397). Part of his commissions on these trades were kicked back to Scharf (R. 406-407).

In April 1964, a similar arbitrage account was opened by petitioner's father, Sidney Samuels, and Bernard Luckman in the name of Hondo Trading Corporation (Govt. Ex. 65-A-B, R. 232; R. 332-334). Hondo was also a shell corporation that had no assets and the money for its purchases was supplied by Luckman and Samuels (R. 332-334). Petitioner Blauner [11] handled the transactions carried out in the name of Hondo Trading Corporation (R. 334-335, 955, 985; Govt. Ex. 44, R. 232). From April through July 1964, Hondo Trading Corporation purchased and resold approximately seven and one half million dollars worth of foreign securities (R. 259-269; Govt. Ex. 111, R. 253), realizing a profit of $41,000 (Govt. Ex. 116, R. 291). Neither Weston Trading Corporation nor Hondo Trading Corporation made pay-

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[11] Petitioner Blauner was also a customer's man at Coggeshall & Hicks.

ment of the sizeable interest equalization taxes which accrued on account of these transactions (R. 258-266; Govt. Exs. 111, 112, R. 253).

In the summer of 1964, petitioners, together with Scharf, evolved a scheme whereby arbitrage trading could be continued in a manner so as fraudulently to avoid imposition of any interest equalization tax (R. 408, 410-411). Their plan involved purchasing foreign-owned foreign securities in the name of a non-resident American citizen who would act as a "straw" and sign false statements that the purchases were being made for his account and false certificates of American ownership (R. 68-69, 109, 408-409).[12] Defendant Binder arranged for Roy Hazael, a naturalized American citizen living in a Canadian suburb of Detroit, to meet with Scharf in New York. Petitioner Samuels handled most of the resale transactions for Management House, Inc., and he was fully familiar with all aspects of the arrangement (R. 72-75, 98, 146-148). Petitioner Blauner sometimes assisted in the resale transactions (R. 156), and during this time both petitioners met frequently together with Scharf in the latter's office in Westport, Connecticut (R. 70-71, 148-149).

Samuels was in a high tax bracket as a result of commissions from the earlier transactions for Weston Trading Corporation, and he did not wish any further commission income to be attributed to him (R. 417). He made an arrangement with Carl Pollack,

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[12] The false certificates of ownership were attached to the purchased foreign stock certificates when resold.

a fellow customer's man at Coggeshall & Hicks, whereby Pollack received the arbitrage commission and kicked back part of the money to petitioner in cash (R. 417, 425-426). Samuels explained to Pollack that he, Scharf, and Blauner were partners in the arbitrage trading (R. 412, 417-418). The gross commissions thereby attributed to Pollack approximated $80,000 (R. 438).

During the fall of 1964, Blauner acted as a roving emissary for Scharf and attempted to find sources of foreign stock, both in Canada and in Europe, and to make arrangements with foreign brokers who would purchase such stock on margin and send it to New York brokers for resale (R. 155-156, 652-658). For his efforts, Blauner was paid more than $38,900 between October 5 and December 11, 1964, by Scharf's corporation, Management House, Inc. (R. 297-299, 778-780, 787; Govt. Exs. 13, 30-33, R. 778). He also received a $5,000 payment from an American broker, James Anthony & Company, in January 1965, which purported to be a "commission" from proceeds in an account operated at that firm for Hazael by Management House (R. 1016-1017; Govt. Ex. 109, R. 1015). Although Blauner did not receive these payments in his own name and, in fact, denied receiving them at all, the evidence showed that he maintained a New York bank account in the name of one Wolf Schenker, that the checks were made out to Schenker, and that Blauner signed Schenker's name to them (R. 784-791). Schenker was Blauner's brother-in-law, and he

lived in Brazil where he was in the textile business (R. 840-841).

Blauner was called as a witness before the grand jury on March 8, 1966 (R. 782). At the trial the government read a portion of his grand jury testimony to the jury (R. 781-791) and also used the testimony on cross-examination (R. 973-974, 988-1000). Blauner also introduced a portion of this testimony in evidence (R. 811-813, 815, 818-832, 1017-1019, 1030-1041).

Prior to testifying before the grand jury, Blauner was advised, and stated that he understood, that the subject of the grand jury's inquiry was possible violations of the interest equalization tax laws during 1964 and 1965, that he did not have to say anything, that anything he said of an incriminating nature could be used against him, and that he had a right to the assistance of counsel (R. 781-782). He then proceeded to testify (R. 44a-95a).

Some eight months later, on November 1, 1966, Blauner was again called before the grand jury (R. 96a). After being advised of his rights and told that the grand jury would consider whether or not there was evidence sufficient to warrant his indictment, he was excused so that he could obtain counsel (R. 97a-100a). On November 10, 1966, he appeared again before the grand jury and invoked his constitutional right not to answer questions (R. 105a-107a). At trial, Blauner was the only defendant to present evidence. He denied any connection with Scharf, his companies, or Hazael (R. 836-838).

Petitioners were indicted on November 29, 1966, with Scharf and Binder named as co-defendants (R. 1a). Petitioners and Binder pleaded not guilty on December 8, 1966 (R. 2a). Defendant Scharf never appeared, and a bench warrant for his arrest, was issued on December 6, 1966 (R. 2a). Petitioners pre-trial motions were granted in part and denied in part on December 29, 1967 (R. 3a; Pet. 17-28). Nothing further transpired until March 27, 1968, when the case was marked off the trial calendar by the district court (Weinfeld, J.) (R. 3a). It remained off the trial calendar until November 30, 1970, when the district court scheduled the case for a January 1971 trial (R. 4a).

Petitioners, who were represented by counsel from their indictment in 1966 (R. 1a) and had been free on bail (R. 2a), at no time demanded a prompt trial (R. 1a-5a). On December 31, 1970, however, petitioners moved for dismissal of their indictments on the ground that they had been denied a speedy trial (R. 4a, 37a-41a). The motion was denied by the district court (Mansfield, J.) during a pre-trial proceeding on January 8, 1971 (Transcript of Proceedings, January 8, 1971, pp. 32-42; Pet. 4). Defendant Scharf's case was severed on the first day of trial, which began on January 14, 1971 (R. 2).

ARGUMENT

1. Petitioners contend (Pet. 12-14; Pet.-B, 12-13) that their convictions violate the *ex post facto* clause of the Constitution. This contention, which apparently

relates solely to the conspiracy count,[13] seems to be based upon the facts that evidence as to transactions undertaken prior to the enactment of the Interest Equalization Tax Act was admitted at trial and that the trial judge denied petitioners' request to charge the jury not to consider such transactions in determining the existence of a conspiracy. See Pet. 15. However, the evidence of pre-enactment transactions was properly admitted, because, as the trial judge noted, such transactions were relevant to the determination of the purpose, intent and knowledge with which acts were committed thereafter (R. 1071, 1076-1077). Thus the admission of the evidence did not offend the *ex post facto* clause of the Constitution. *United States* v. *Russo*, 442 F. 2d 498, 501 (C.A. 2); *Christianson* v. *United States*, 226 F. 2d 646, 652 (C.A. 8), certiorari denied, 350 U.S. 994. Petitioners' requested charge to disregard all such evidence was therefore, as the court of appeals noted, "correctly denied * * * for the pre-September 2, 1964 acts were evidence both of the beginnings of the enterprise and the intent of the defendants" (Pet. App. B, 35, n.4).[14]

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[13] See Pet. 13-14, Pet.-B, 13. In any event, the substantive counts charge crimes which clearly could not have been complete until after enactment of the Interest Equalization Tax Act.

[14] The request presumably would have been granted had the charge been clearly framed as an instruction limiting use of such evidence to purpose, intent and knowledge (R. 1077-1078). The trial judge's charge to the jury did in fact refer several times to the date of enactment (R. 1190, 1191, 1203,

The indictment charged the commission of overt acts after the date of the enactment of the Interest Equalization Tax Act, and there was ample proof that petitioners had reaffirmed their participation in the conspiracy after that date. That the jury accepted this proof of petitioners' post-enactment involvement is indicated by its verdict on the substantive counts charging petitioners with attempted evasion of tax liabilities for periods subsequent to the enactment of the Act and with assisting in the preparation or presentation of false returns for such periods. Thus the court of appeals correctly concluded that the conspiracy conviction was "based on post-September 2, 1964 acts" (Pet. App. B, 35).

Moreover, although the issue is not raised by the facts here, a conviction of conspiracy to evade taxes and defraud the United States based on transactions undertaken prior to passage of the taxing act would not violate the *ex post facto* clause, as long as the statutory offense of conspiracy was in effect at the time of the transactions: the fact that the tax which conspirators seek to evade has not yet been imposed or enacted does not alter the criminal nature of the conspiratorial undertaking. Cf. *United States* v. *Klein*, 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924 (upholding a conspiracy conviction when the tax sought to be evaded never in fact accrued). See

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1211) and, contrary to petitioner Samuel's contention (Pet. 14-15), permitted "the jury [to] pass upon this critical factual aspect of the case" (Pet. 15).

also *Hammerschmidt* v. *United States*, 265 U.S. 182; *Dennis* v. *United States*, 384 U.S. 855.

2. Petitioners contend (Pet. 10-11; Pet.-B, 13-14) that they were deprived of their Sixth Amendment right to a speedy trial because of the delay between indictment and trial. The government is of the view that the courts below properly rejected this claim because (1) petitioners failed to demand a trial,[15] see, *e.g.*, *Bruce* v. *United States*, 351 F. 2d 318 (C.A. 5), certiorari denied, 384 U.S. 921; *Moser* v. *United States*, 381 F. 2d 363 (C.A. 9), certiorari denied, 389 U.S. 1054; (2) there was no showing of any prejuduce resulting from the delay,[16] see *United States* v. *Ewell* 383 U.S. 116, 122; *Dickey* v. *Florida*, 398 U.S. 30, 36-38; and (3) under the circumstances the delay was justified and not unreasonable for, as the

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[15] Petitioner Blauner's contention (Pet. B, 14) that he requested his attorneys to obtain a speedy trial was not asserted in the district court and therefore is not properly raised here. *Frazier* v. *United States*, 335 U.S. 497, 503. His motion to dismiss on speedy trial grounds (Pet.-B, 14) was made only on the eve of trial (R. 27a).

[16] Petitioner Blauner attributes his showing as a "poor and unconvincing witness" (Pet.-B, 9) to a faulty memory because of delay, but the record reveals that his memory was impaired only during cross-examination, as is illustrated by the record references relied on by petitioner (*ibid.*). He also testified (R. 994) that his memory was as good at the trial as it was at the time he testified before the grand jury.

Finally, while Blauner now alleges that he was prejudiced by the death of "[t]hree possible defense witnesses" (Pet.-B, 9), he has at no time made any showing nor does he explain how his defense was impaired or how he suffered any other prejudice because of the unavailability of the alleged witnesses.

court of appeals noted, "[o]bviously one of the principal reasons for the government's delay in moving for trial was the fugitive status of Henry Scharf, the principal defendant" (Pet. App. B, 37). However, this Court may wish to hold these cases for disposition of *Barker* v. *Wingo*, No. 71-5255, certiorari granted, 404 U.S. 1037, which presents a speedy trial claim similar in some respects to that made by petitioners.

3. Petitioner Blauner's contention (Pet.-B, 14-15) that it was improper to use his grand jury testimony at trial because he was called as a witness before the grand jury without being advised that he was a potential defendant or a target of the investigation is without merit. Blauner makes no showing that he was in fact a target of the investigation, and the court of appeals properly found that there was "substantial doubt" that the government regarded him as a potential defendant when he was brought before the grand jury (Pet. App. B, 38). But assuming arguendo that Blauner had been considered a potential defendant, there was no error since he was fully advised of his rights prior to his examination and he thereafter elected to testify. *United States* v. *Friedman*, 445 F. 2d 1076, 1088 (C.A. 9); *United States* v. *Wolfson*, 405 F. 2d 779, 784-785 (C.A. 2); *Kitchell* v. *United States*, 354 F. 2d 715, 720 (C.A. 1), certiorari denied, 384 U.S. 1011. *Jones* v. *United States*, 342 F. 2d 863 (C.A. D.C.), cited by petitioner Blauner (Pet.-B, 15), is not to the contrary (see 342 F. 2d at 874, Prettyman, J.,

dissenting), and there is no conflict among the courts of appeals.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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MAY 1972.

APPENDIX

18 U.S.C. 2(a):

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

26 U.S.C. 7201:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall * * * be guilty of a felony * * *.

26 U.S.C. 7206:

> Any person who * * * (2) [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue law, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter * * * shall be guilty of a felony * * *.

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